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No. 79-1737

# In the Supreme Court of the United States

OCTOBER TERM, 1979

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TIM Z. OGLE, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### QUESTIONS PRESENTED

1. Whether the district court's instructions to the jury erroneously defined the word "corruptly" as used in the obstruction of justice statute, 18 U.S.C. 1503.

2. Whether the district court's instructions on proof of intent constituted reversible error.

3. Whether defense counsel's failure to object to the jury instructions on intent deprived petitioner of the effective assistance of counsel.

4. Whether the district court erred in sustaining objections to questions asked petitioner on redirect examination.

5. Whether the prosecutor's question to a witness who claimed her Fifth Amendment privilege was reversible error.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Statement | 1 |
| Argument | 3 |
| Conclusion | 15 |


## TABLE OF AUTHORITIES

Cases:


*Broadbent* v. *United States*, 149 F. 2d 580 ..... 4

*Chambers* v. *Maroney*, 399 U.S. 42 ..... 10

*Cohen* v. *United States*, 378 F. 2d 751, cert. denied, 389 U.S. 897 ..... 8

*Cooper* v. *Fitzharris*, 551 F. 2d 1162 ..... 10

*Douglas* v. *Alabama*, 380 U.S. 415 ..... 15

*Mann* v. *United States*, 319 F. 2d 404, cert. denied, 375 U.S. 986 ..... 7

*Martin* v. *United States*, 166 F. 2d 76 ..... 6

*McMann* v. *Richardson*, 397 U.S. 759 ..... 10, 11

*Namet* v. *United States*, 373 U.S. 179 ..... 13, 15

*Pettibone* v. *United States*, 148 U.S. 197 ..... 6

*Robbins* v. *Small*, 371 F. 2d 793, cert. denied, 386 U.S. 1033 ..... 14

*Salazar* v. *Estelle*, 547 F. 2d 1226 ..... 10

*United States* v. *Abrams*, 427 F. 2d 86, cert. denied, 400 U.S. 832 ..... 6

Page

Cases—(Continued):

*United States* v. *Arthur*, 544 F. 2d 730 ..... 10

*United States* v. *Baker*, 611 F. 2d 964 ..... 5

*United States* v. *Chiantese*, 560 F. 2d 1244 ..... 7

*United States* v. *Diggs*, 527 F. 2d 509 ..... 7-8, 10

*United States* v. *Fasolino*, 586 F. 2d 939 ..... 5

*United States* v. *Garrett*, 574 F. 2d 778, cert. denied, 436 U.S. 919 ..... 7

*United States* v. *Haas*, 583 F. 2d 216, cert. denied, 440 U.S. 981 ..... 5, 6

*United States* v. *Haldeman*, 559 F. 2d 31, cert. denied, 431 U.S. 933 ..... 5, 6, 8

*United States* v. *Hearst*, 563 F. 2d 1331, cert. denied, 435 U.S. 1000 ..... 14

*United States* v. *Heath*, 580 F. 2d 1011, cert. denied, 439 U.S. 1075 ..... 8

*United States* v. *Jackson*, 607 F. 2d 1219, cert. denied, No. 79-993 (Feb. 19, 1980) .... 5, 7

*United States* v. *Johnson*, 585 F. 2d 119 ..... 5

*United States* v. *King*, 461 F. 2d 53 ..... 14

*United States* v. *Lazzerini*, 611 F. 2d 940 ..... 5

*United States* v. *Malinowski*, 472 F. 2d 850, cert. denied, 411 U.S. 970 ..... 12

*United States* v. *Orrico*, 599 F. 2d 113 ..... 10

*United States* v. *Park*, 421 U.S. 658 ..... 4

*United States* v. *Partin*, 552 F. 2d 621 ..... 4, 5

Page

Cases—(Continued):

*United States* v. *Porth*, 426 F. 2d 519, cert. denied, 400 U.S. 824 ..... 12

*United States* v. *Quilty*, 541 F. 2d 172 ..... 12

*United States* v. *Reeves*, 594 F. 2d 536, cert. denied, 442 U.S. 946 ..... 7

*United States* v. *Releford*, 352 F. 2d 36, cert. denied, 382 U.S. 984 ..... 8

*United States* v. *Robinson*, 545 F. 2d 301 .... 7, 10

*United States* v. *Ryan*, 455 F. 2d 728 ..... 5-6

*United States* v. *Smaldone*, 484 F. 2d 311, cert. denied, 415 U.S. 915 ..... 8

*United States* v. *Spiegel*, 604 F. 2d 961, cert. denied, Nos. 79-1184, 79-1194 (May 12, 1980) ..... 7

*United States* v. *White*, 557 F. 2d 233 ..... 5

*United States* v. *Woodring*, 464 F. 2d 1248 ..... 8

Constitution and statutes:

United States Constitution:

First Amendment ..... 6

Fifth Amendment ..... 1, 13, 14

18 U.S.C. 1503 ..... 1, 3, 5, 6

18 U.S.C. 1504 ..... 6

Page

**Miscellaneous:**

E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* (3d ed. 1977):

Vol. 1 ..... 9

Vol. 2 ..... 4

## OPINION BELOW

The opinion of the court of appeals (Pet. App. 53-80) is reported at 613 F. 2d 233.

## JURISDICTION

The judgment of the court of appeals was entered on November 1, 1979. A petition for rehearing was denied on March 5, 1980 (Pet. App. 81). On March 24, 1980, Mr. Justice White extended the time for filing a petition for a writ of certiorari to May 4, 1980, and the petition was filed on May 1, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the District of Colorado, petitioner was convicted of obstruction of justice, in violation of 18 U.S.C. 1503. He was sentenced to 15 months' imprisonment and fined $500. The court of appeals affirmed (Pet. App. 53-80).

The evidence at trial established that petitioner, a pilot for Continental Airlines, was a member of a group opposed to the federal income tax. Beginning in February 1978, petitioner conducted a tax course using a text that he authored entitled "Good Citizenship with Constitutional Tax Return and Procedures" (II R. 180-181; III R. 277, 308; Gov't Exh. 2).[1] This book teaches that tax crimes are not true crimes, and it gives instructions and provides forms for filing W-4 Employee Withholding Allowance Certificates designed to prevent the withholding of taxes, for filing returns that invoke the Fifth Amendment and disclose only the taxpayer's name and address, and for filing nameless tax returns. The book

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[1] "R." refers to the record on appeal.

also explains that a jury has a right of nullification to acquit for any reason, which it can exercise to protect citizens against unjust laws (Gov't Exh. 2 at 9-10, 12).

A pamphlet entitled "Handbook for Jurors" was also used in the tax course. This Handbook discusses the principle of jury nullification, noting that juries are not given instructions on this subject (Gov't Exh. 1; II R. 133-134; III R. 268, 296). The distribution of this pamphlet to jurors was discussed in the tax class (II R. 147-149).

On February 21, 1978, petitioner was present at the trial of one Norman Gigax, who was charged with filing a false W-4 employee withholding form (II R. 84-86). Among the jurors selected was Colleen Hansen, whom petitioner recognized as a Continental flight attendant (III R. 249). At the morning recess, petitioner introduced himself to Gigax and mentioned his acquaintanceship with Mrs. Hansen (III R. 248, 252). Later, in the courthouse elevator, petitioner said hello to Mrs. Hansen, who recognized him as a Continental Airlines pilot. After the luncheon recess, petitioner, at Gigax's request, sat at the defense table and took notes (II R. 86-87; III R. 249-252).

That evening, petitioner telephoned Jacquelyn Lagoni, another Continental flight attendant who was a student in petitioner's tax course and knew Colleen Hansen (II R. 127-129, 133-134). Petitioner stated that Mrs. Hansen was a juror in a pending case and inquired whether she had seen a copy of the "Handbook for Jurors" (II R. 134-135, 195; III R. 260-261, 294). Approximately 15 minutes after this conversation, Lagoni called Mrs. Hansen and said that she knew Hansen was a juror on the *Gigax* case because petitioner had seen her at the courthouse. Lagoni mentioned the "Handbook for Jurors" and asked Hansen if she would like a copy. Lagoni offered either to have

petitioner deliver a copy or to do so herself. Mrs. Hansen refused the offer and reported the incident to the judge (II R. 87, 89-91, 131, 196, 200-201).

Petitioner was thereafter indicted for obstruction of justice. In his own defense, petitioner testified that he called the Lagonis to reschedule a dinner date and to satisfy his curiosity whether Mrs. Hansen had seen the Handbook. He denied that he had called with any intention to have Mrs. Lagoni contact Mrs. Hansen or that he had made any such suggestion to Mrs. Lagoni (III R. 259-261, 269-270).

## ARGUMENT

1. Petitioner contends (Pet. 14-20) that the district court erred in instructing the jury as to the meaning of the term "corruptly" in 18 U.S.C. 1503. After describing the charges alleged in the indictment (V R. 3) and reading the pertinent language of the statute (V R. 5),[2] the court instructed the jury as follows (V R. 6-7):

> [An essential element of the offense is] that [petitioner's] acts in causing the petit juror to be contacted were done corruptly and also with the specific intent to impede or influence a petit juror or to impede or obstruct the administration of justice.
>
> * * * * *
>
> [T]he word "endeavor" means any effort to attempt to accomplish the evil purpose that the statute was

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[2]The statute reads in pertinent part:

> Whoever corruptly * * * endeavors to influence, intimidate, or impede any * * * petit juror * * * in the discharge of his duty * * * or corruptly or by threats of force * * * influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

> designed to protect, and the word "corruptly" means any endeavor to influence a juror in the performance of his or her duties or to influence, obstruct or impede the due administration of justice * * *.[3]

Petitioner claims that the district court erred in refusing to give his proposed instructions (Pet. 14-15; V R. 16-17):

> The word "corruptly" means an endeavor, done with a wicked or evil purpose, to influence a juror in the performance of his or her duties or to influence, obstruct or impede the due administration of justice.

However, read as a whole (see, *e.g.*, *United States* v. *Park*, 421 U.S. 658, 674 (1975)), the court's charge adequately apprised the jury of the requisite mental element of the offense. The court explained to the jury that a finding of guilt must rest on a determination that petitioner acted "with the specific intent to do something that the law forbids, that is to say with a bad purpose either to disobey or to disregard the law" (V R. 7). The court several times reiterated that petitioner must have acted "corruptly" in order to be convicted (V R. 3, 5, 6) and explained that an "endeavor" undertaken "corruptly" was "any effort to attempt to accomplish the evil purpose that the statute was designed to protect * * *" (V R. 6). Finally, the court's repeated use of the phrases "influence and impede" and "influence, obstruct, or impede" (V R. 3, 5-7) also imparted to the jury the sense that a wrongful intention is required under the statute. See *United States* v. *Partin*, 552 F. 2d 621, 642 & nn. 26, 27 (5th Cir. 1977). While the court's instructions

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[3]These instructions were derived from *Broadbent* v. *United States*, 149 F. 2d 580, 581 (10th Cir. 1945), and are set out in 2 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* §§ 32.04, 32.05 (3d ed. 1977).

undoubtedly could have more clearly compartmentalized the elements pertaining to "corruptly" and "endeavor," they sufficiently conveyed to a "reasonable jury exercising common sense" (*United States* v. *Johnson*, 585 F. 2d 119, 128 (5th Cir. 1978)) that it "had to find * * * there was a corrupt endeavor which was an effort to wrongly influence [Mrs. Hansen]" (Pet. App. 67) See also *United States* v. *Jackson*, 607 F. 2d 1219, 1221-1222 (8th Cir. 1979), cert. denied, No. 79-993 (Feb. 19, 1980). The exact wording requested by petitioner was only an alternative formulation of an idea adequately expressed in the instructions as given.[4]

Nor, contrary to petitioner's assertion, does the decision below create a conflict in the circuits. The courts of appeals are uniformly in agreement that the word "corruptly" in 18 U.S.C. 1503 means that the endeavor to influence must be made with a specific intent to achieve a wrongful purpose. See *United States* v. *Baker*, 611 F. 2d 964, 967-968 (4th Cir. 1979); *United States* v. *Lazzerini*, 611 F. 2d 940, 942 (1st Cir. 1979); *United States* v. *Jackson*, *supra*, 607 F. 2d at 1221-1222 (8th Cir.); *United States* v. *Fasolino*, 586 F. 2d 939, 941 (2d Cir. 1978); *United States* v. *Haas*, 583 F. 2d 216, 220 (5th Cir. 1978), cert. denied, 440 U.S. 981 (1979); *United States* v. *Haldeman*, 559 F. 2d 31, 114 n. 226 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977); *United States* v. *White*, 557 F. 2d 233, 235 (10th Cir. 1977); *United States* v. *Ryan*, 455

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[4]Petitioner impliedly suggests that the court's instructions in this case would allow a jury to convict an innocent or lawful endeavor to influence a juror. As already discussed, however, the instructions were adequate to foreclose this possibility. See also *United States* v. *Jackson*, *supra*; *United States* v. *Partin*, *supra*. Moreover, petitioner's defense at trial was not that he had endeavored to influence Mrs. Hansen for some innocent or benevolent purpose, but rather that he had not endeavored or caused anyone to endeavor to influence her at all.

F. 2d 728, 734 (9th Cir. 1971); see also *Pettibone* v. *United States*, 148 U.S. 197, 206 (1893). This central idea is variously expressed by the courts in such terms as "for an improper motive" (*Martin* v. *United States*, 166 F. 2d 76, 79 (4th Cir. 1948)), "for an evil or wicked purpose" (*United States* v. *Ryan*, *supra*, 455 F. 2d at 734), or "having an evil or improper purpose or intent" (*United States* v. *Haldeman*, *supra*, 559 F. 2d at 114 n.226). However, no specific terminology is required, provided that, as occurred here, the jury is properly advised of the nature of the defendant's intent required to convict. See *United States* v. *Haas*, *supra*, 583 F. 2d at 220; cf. *United States* v. *Abrams*, 427 F. 2d 86, 90 (2d Cir.), cert. denied, 400 U.S. 832 (1970).[5]

2. Petitioner also challenges (Pet. 20-26) the district court's instructions to the jury on the question of proof of intent. The court's charge included the following statement (V R. 8):

> While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails

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[5]Petitioner additionally argues (Pet. 46-48) that the district court's instructions on the meaning of "corruptly" have eliminated the distinction between the offense of obstruction of justice defined in 18 U.S.C. 1503 and that defined in 18 U.S.C. 1504, which does not on its face require that the attempt to influence be done corruptly. As discussed above, however, the court's instructions in this regard adequately informed the jury of the meaning of the term "corruptly" as used in 18 U.S.C. 1503. Since the jury was correctly instructed on this element of the offense, there is also no merit to petitioner's argument (Pet. 26-29) that the court's charge has placed a chilling effect upon the exercise of First Amendment rights innocently to influence jurors. We also note that the jury was instructed that the First Amendment protected the expression and dissemination of the views contained in the "Handbook for Jurors" and petitioner's views on the income tax system, that petitioner was not on trial for advocating these views, and that a guilty verdict could not be based on the fact that petitioner had promoted these views or distributed the Handbook (V R. 26).

> to do, there can be no eyewitness account of the state of mind with which the acts were done or omitted, but what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged, and it is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted, so unless the contrary appears from the evidence the jury may draw the inference that the accused intended all of the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

Petitioner claims that the Tenth Circuit is in conflict with the other courts of appeals regarding the propriety of this so-called "*Mann*" charge (see *Mann* v. *United States*, 319 F. 2d 404, 407 (5th Cir. 1963), cert. denied, 375 U.S. 986 (1964)), and that the court erred in holding that the instruction, to which no objection was raised at trial, was not "plain error" in this case.

Several court of appeals have disapproved the *Mann* charge on the ground that it may be interpreted by a jury to shift the burden of proof on criminal intent to the defendant; however, they have generally found that other parts of the instructions to the jury cured the problem in individual cases. See, *e.g.*, *United States* v. *Jackson*, *supra*, 607 F. 2d at 1220-1221 (8th Cir.); *United States* v. *Spiegel*, 604 F. 2d 961 (5th Cir. 1979), cert. denied, Nos. 79-1184, 79-1194 (May 12, 1980); *United States* v. *Reeves*, 594 F. 2d 536, 540-541 (6th Cir.), cert. denied, 442 U.S. 946 (1979); *United States* v. *Garrett*, 574 F. 2d 778 (3d Cir.), cert. denied, 436 U.S. 919 (1978); *United States* v. *Chiantese*, 560 F. 2d 1244 (5th Cir. 1977) (en banc); *United States* v. *Robinson*, 545 F. 2d 301 (2d Cir. 1976);

*United States* v. *Diggs*, 527 F. 2d 509 (8th Cir. 1975); *Cohen* v. *United States*, 378 F. 2d 751 (9th Cir.), cert. denied, 389 U.S. 897 (1967); *United States* v. *Releford*, 352 F. 2d 36 (6th Cir. 1965), cert. denied, 382 U.S. 984 (1966). Indeed, contrary to petitioner's assertion, the Tenth Circuit does not favor this charge. See *United States* v. *Heath*, 580 F. 2d 1011, 1025 (10th Cir. 1978), cert. denied, 439 U.S. 1075 (1979); *United States* v. *Smaldone*, 484 F. 2d 311, 321 (10th Cir. 1973), cert. denied, 415 U.S. 915 (1974); *United States* v. *Woodring*, 464 F. 2d 1248, 1251 (1972). In line with the approach generally followed by the other courts of appeals, the Tenth Circuit examines the charge in the context of the entire set of instructions to determine whether, in a given case, the jury was likely to have been misled as to the proper allocation of the burden of proof. What petitioner claims to be a multiplicity of standards is really a case-by-case determination of the adequacy of the overall instruction in light of the particular circumstances. See also *United States* v. *Haldeman*, 559 F. 2d 31, 116-117 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977).[6]

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[6]We recognize that the Fifth Circuit has prospectively established a stricter standard of review for *Mann* charges, holding that such instructions, although not automatically grounds for reversal, are erroneous and cannot be cured in future cases by reference to correct statements elsewhere in the charge regarding the government's burden of proof. Whatever differences may ultimately result from this exercise of the Fifth Circuit's supervisory power, we do not believe that the situation warrants the intervention of this Court at present. The courts of appeals have recognized the potential danger of *Mann* charges and have carefully reviewed claims that such a charge was likely to have prejudiced a defendant. We submit that the precise approach to resolving the *Mann* issue—either to adhere to a case-by-case determination or to follow the Fifth Circuit in establishing a supervisory rule—is best left at this point to the informed judgment of each circuit.

Applying this standard in the instant case, it is clear that the instructions in their entirety adequately conveyed the nature of the government's burden of proof on the issue of intent. At the outset, the jury was told that it was not to single out any particular instruction but instead was to consider all the instructions (V R. 2), and this admonition to consider the instructions as a whole was repeated at the conclusion of the charge (V R. 15). The court further informed the jury that "[t]he burden is always on the prosecution to prove guilt beyond a reasonable doubt, and this burden never shifts to a defendant, for the law never imposes upon a defendant the duty of calling any witnesses or producing any evidence" (V R. 4-5); this instruction was repeated several times (V R. 6, 12, 13). Moreover, immediately before the challenged portion of the charge, the court explained to the jury that "[w]ith respect to lesser offenses, * * * intent may be presumed from the voluntary doing of the forbidden act, but with respect to major crimes such as charged in this case specific intent must be proved before there can be a conviction. Specific intent, as the term itself suggests, requires more than a mere general intent to engage in certain conduct" (V R. 7-8). And, directly following the contested instruction, the court specifically stated that "[i]n determining the issue as to intent, the jury are entitled to consider any statement made and acts done or omitted by the accused and all facts and circumstances in evidence which may aid determination of state of mind" (V R. 8).

Thus, notwithstanding general criticisms of the *Mann* charge (see 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 14.13 (3d ed. 1977)), it is clear that in this case the instructions as a whole neither shifted the burden of proof to the defendant nor invited the jury to disregard the totality of the circumstances concerning petitioner's intent. Since the objectionable phrase in the

court's charge was but one small part of a complete and correct exposition of how the jury should proceed in determining whether the government had proved petitioner's intent, the court of appeals properly concluded that the instructions were not plain error.[7]

3. Petitioner next claims (Pet. 29-33) that he was denied the effective assistance of counsel at trial because his attorney failed to object to the court's instruction on proof of intent. This one alleged error on the part of defense counsel is not enough to demonstrate inadequate representation. The assistance of counsel need not be errorless to be effective. See *Cooper* v. *Fitzharris*, 551 F. 2d 1162 (9th Cir. 1977); *Salazar* v. *Estelle*, 547 F. 2d 1226 (5th Cir. 1977). Moreover, as discussed above, the instructions in their entirety were proper, and the one objectionable portion of the court's charge on intent was very unlikely to have misled the jury. Cf. *Chambers* v. *Maroney*, 399 U.S. 42, 53-54 (1970).

The general rule is that the question of the effective assistance of counsel should ordinarily be left to the "good sense and discretion of the trial courts." *McMann* v. *Richardson*, 397 U.S. 759, 771 (1970). Here, the district

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[7]Petitioner's reliance (Pet. 22-23) on *United States* v. *Robinson*, 545 F. 2d 301 (2d Cir. 1976), is misplaced. Although the charge given in that case was very similar to the one in the instant case, it was the only instruction given the jury on proof of intent. Thus, the court of appeals concluded that, in the absence of a more complete and accurate explanation in the instructions as a whole, the jury probably had a mistaken view of the government's burden of proof on the issue of intent. Other cases cited by petitioner also presented quite different circumstances. In *United States* v. *Arthur*, 544 F. 2d 730, 736-737 (4th Cir. 1976), the instruction, instead of being phrased as a permissive inference, directed the jury to find intent from "the natural result of [the defendant's] actions." And in both *United States* v. *Orrico*, 599 F. 2d 113, 119 n.5 (6th Cir. 1979), and *United States* v. *Diggs*, 527 F. 2d 509, 514-515 (8th Cir. 1975), the court reversed for insufficiency of the evidence and found a *Mann* charge prejudicially erroneous in light of the weakness of the government's case.

court specifically found that counsel was competent, stating that he "did a good job * * * he did as well as anybody could" (VIII R. 20-21), and the court of appeals agreed with that judgment (Pet. App. 64). The record demonstrates that defense counsel in this case performed "within the range of competence demanded of attorneys in criminal cases" (*McMann* v. *Richardson*, *supra*, 397 U.S. at 771), and there is simply no basis for a conclusion of incompetent representation.

4. Petitioner further contends (Pet. 33-42) that the district court erred in excluding certain defense testimony that pertained to the issue of petitioner's criminal intent.

a. On redirect examination, petitioner was asked by his counsel whether he had taken any action designed to influence Colleen Hansen with respect to the *Gigax* case and whether his telephone call to Jacquelyn Lagoni was made with the intent to influence Mrs. Hansen in the exercise of her duty. The district court sustained objections to both questions (III R. 305-306). Petitioner claims that this was an erroneous exclusion of evidence critical to his defense.

The record establishes, however, that the answers to these questions would in fact have been entirely repetitious of petitioner's other testimony. Petitioner testified on direct examination, on cross examination, and on redirect (immediately following the excluded questions) that his intent in calling Mrs. Lagoni was to rearrange a dinner date and to satisfy his curiosity whether Mrs. Hansen had seen the Handbook (III R. 258-260, 287, 306). His similar testimony before the grand jury was also in evidence (III R. 288-291). In addition, petitioner testified that he did not ask Mrs. Lagoni to call Mrs. Hansen; that he said nothing that would have led Mrs. Lagoni to believe he wanted her to call Mrs.

Hansen; and, in answer to questions almost identical to those later objected to, that he never attempted either to contact Mrs. Hansen or to have Mrs. Lagoni do so for the purpose of influencing Mrs. Hansen's decision as a juror (III R. 261, 269-270). In these circumstances, the court of appeals correctly held (Pet. App. 70) that the district court acted within its discretion in disallowing the repetitive testimony.

b. The district court also excluded petitioner's testimony about the research he had conducted that formed the basis for his beliefs on jury nullification (III R. 268-269). Petitioner's contention that this testimony would have negated the element of criminal intent is incorrect. As the jury was expressly instructed (V R. 26), petitioner was on trial for his efforts to obstruct justice, not for disseminating the Handbook or for believing or advocating the views contained therein. Whatever petitioner's beliefs in the correctness of the ideas taught in the Handbook, and whatever his motives may have been in advocating those ideas, they were not relevant to the question of his intent to violate the statute. See *United States* v. *Quilty*, 541 F. 2d 172, 175 (7th Cir. 1976); *United States* v. *Malinowski*, 472 F. 2d 850, 855-859 (3d Cir.), cert. denied, 411 U.S. 970 (1973); *United States* v. *Porth*, 426 F. 2d 519, 523 (10th Cir.), cert. denied, 400 U.S. 824 (1970). Moreover, petitioner did not in fact seek to offer a defense that he had endeavored to influence Mrs. Hansen in good faith; rather, the entire thrust of his defense was a complete denial of any effort to offer the Handbook to Colleen Hansen or to influence her in any way.

Petitioner had already been allowed to testify at some length regarding his personal beliefs on jury nullification and the purpose of the Handbook (III R. 263-268), although this evidence was not strictly material to any valid defense. When the district court refused to allow

him to discuss his underlying research, it was acting well within its discretion to exclude irrelevant and cumulative evidence.

5. Petitioner lastly argues (Pet. 42-46) that the prosecutor engaged in misconduct by asking Jacquelyn Lagoni about her W-4 tax withholding form, since he had previously been informed of her intention to claim her Fifth Amendment privilege with regard to that subject (II R. 10).

The single disputed question occurred after Mrs. Lagoni had been called as a government witness[8] and testified that the subject of filing W-4 forms was discussed in petitioner's tax class. The prosecutor then inquired, "And during the period of time that you took this class, did you change your W-4 form?" (II R. 154). Mrs. Lagoni invoked the Fifth Amendment and refused to answer the question. Petitioner's counsel objected, referring to the advance notice given to the government that the witness intended to assert her privilege if questioned on that subject. The prosecutor responded that he did not believe Mrs. Lagoni had a valid claim of privilege regarding the one question he had posed. The district judge agreed, but advised the prosecutor not to continue that line of examination (II R. 155). No further questions on the subject were asked.

In this case, as in *Namet* v. *United States*, 373 U.S. 179, 188 (1963), the prosecutor did not believe that Mrs. Lagoni could properly invoke her privilege against self-incrimination in response to the simple question whether she had changed her W-4 form, and his position was upheld by the district court. Government questioning that elicits a claim of privilege can only be error when the

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[8]The government had granted immunity to Mrs. Lagoni with respect to the charge of obstruction of justice.

witness has a valid Fifth Amendment claim. *United States* v. *Hearst*, 563 F. 2d 1331, 1341-1342 (9th Cir. 1977), cert denied, 435 U.S. 1000 (1978). And "certainly the prosecutor need not accept at face value every asserted claim of privilege, no matter how frivolous." *Namet* v. *United States*, *supra*, 373 U.S. at 188.

In contrast to *United States* v. *King*, 461 F. 2d 53, 56-57 (8th Cir. 1972), and *Robbins* v. *Small*, 371 F. 2d 793, 794-795 (1st Cir.), cert. denied, 386 U.S. 1033 (1967), upon which petitioner relies (Pet. 46), the government in the instant case neither called Mrs. Lagoni for the sole purpose of eliciting a claim of privilege nor exploited her silence by asking a series of questions designed to leave damaging inferences in the minds of the jurors. Rather, as in *Namet*, the witness here had considerable evidence to offer that supported the government's case. Moreover, petitioner's objection relates to only a single question during a lengthy examination, and it is most unlikely that this brief episode adversely affected the jury.[9] Finally, as the court of appeals observed (Pet. App. 76-77), there is no indication whatever of a deliberate attempt by the prosecutor to prejudice petitioner's case. Accordingly, it cannot be concluded that the government was guilty of misconduct by making "a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege" or by seeking to use such inferences to add "critical weight to the prosecution's case in a form

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[9]We also note that the aspects of Mrs. Lagoni's testimony that tended to exonerate petitioner were materially different from the testimony given by her husband and were directly contradicted by the testimony of Mrs. Hansen. Thus, in comparison to this substantial evidence casting serious doubt on her testimony, Mrs. Lagoni could have been discredited only minimally, if at all, by the single question concerning her W-4 form.

not subject to cross-examination." *Namet* v. *United States*, *supra*, 373 U.S. at 186-187. See also *Douglas* v. *Alabama*, 380 U.S. 415, 419-420 (1965).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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